IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	**Criminal No. 98-267-1**
	:	
FRANK P. BULEI	:	

MEMORANDUM

Broderick, J. **August 26, 1998**

On May 28, 1998 a grand jury returned a 124-count indictment against Defendant Frank P. Bulei ("Defendant") and five others, charging Defendant with mail fraud, conspiracy to defraud the United States, conspiracy to launder monetary instruments, laundering monetary instruments, structuring transactions, and criminal forfeiture. Presently before the Court is the Defendant's motion to dismiss counts of the indictment and to strike prejudicial surplusage, brought pursuant to Fed.R.Crim.P. 7(c)(2), 7(d), and 12(b)(2). The Government has filed an answer in opposition to the Defendant's motion. For the following reasons, the Court will deny Defendant's motion.

Defendant contends that in violation of Fed.R.Crim.P. 7(c)(1), the Fifth Amendment's Grand Jury Clause, and the Sixth Amendment right to be informed of the charges, the indictment against him fails to charge proper mail fraud offenses in Counts 1 through 73 and fails to allege facts constituting money

laundering offenses in Counts 75 through 78 and 91 through 122.

Fed.R.Crim.P. 7(c)(1) requires that each count of an indictment contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." The Third Circuit has held that an indictment is generally deemed sufficient if it 1) contains the elements of the offense intended to be charged, 2) sufficiently apprises the defendant of what he must be prepared to meet, and 3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution. United States v. Olantunji, 872 F.2d 1161, 1165 (3rd Cir. 1989).

Counts 1 through 73 charge seventy-three separate counts of mail fraud in violation of 18 U.S.C. § 1341. Counts 75 through 78 and 91 through 122 charge conspiracy to launder money and money laundering in violation of 18 U.S.C. §§ 1956(h), 1956(a)(1)(A)(I), 1956(a)(1)(B)(I), 1956(a)(1)(B)(ii). Having reviewed these counts in the indictment, the Court finds that each of these counts contains a "plain, concise and definite written statement of the essential facts constituting the offense charged" as required by Fed.R.Crim.P. 7(c)(1). Furthermore, the Court finds that each of these counts in the indictment is sufficient in that it contains the essential elements of the offense intended to be charged, sufficiently apprises the

Defendant of what he must be prepared to meet at trial, and allows the Defendant to show with accuracy to what extent he may plead a former acquittal or conviction as double jeopardy in the event of a subsequent prosecution. United States v. Olantunji, 872 F.2d 1161, 1165 (3rd Cir. 1989).

Defendant further contends that Counts 1-4, 15-17, 28, 39, and 61-63 of the indictment, charging bulk mail mass mailings of solicitations in the guise of bills, invoices and statements of accounts, fail in that they are duplicitous. Duplicity is the vice of charging more than one offense in a single count, as distinguished from multiplicity, which is the charging of a single offense in several counts. United States v. Starks, 515 F.2d 112, 116 (3rd Cir. 1975); Wright, Federal Practice and Procedure 2d § 142 at 469. Defendant's argument is without merit. Each bulk mail mass mailing is a separate mailing under the mail fraud statute and constitutes a separate violation of the statute. The counts charging bulk mail mass mailings are not duplicitous.

Defendant further contends that Count 74 fails to state an offense against the United States. Count 74 charges a conspiracy under 18 U.S.C. § 371 to defraud the United States (as opposed to a conspiracy to commit a substantive offense proscribed by another statute) by obstructing and defeating the lawful governmental functions of the Department of the Treasury in the

collection of accurate data, reports and information relating to domestic currency transactions in excess of $10,000 for use in criminal, tax, and regulatory investigations and proceedings, and the enforcement of the laws and regulations found in 31 U.S.C. §§ 5313, 5322, and 5324, and 31 C.F.R. § 103. Defendant also contends that 18 U.S.C. § 371 is unconstitutionally vague and violates substantive due process as applied in Count 74. Defendant's argument is entirely without merit. The charge in Count 74 clearly states an offense against the United States and is in no way vague or violative of substantive due process. See United States v. Alston, 77 F.3d 713, 717 n.12 (3rd Cir. 1996)(in light of the 1994 amendment to 31 U.S.C. § 5324, the situation in Ratzlaf v. United States, 510 U.S. 135 (1994) is unlikely to occur again.).

Defendant also contends that Counts 75 and 91 through 122 must be dismissed because 18 U.S.C. § 1956(a)(1)(B)(ii) is unconstitutionally vague and violates substantive due process. This argument is likewise entirely without merit. The statute in question, 18 U.S.C. § 1956(a)(1)(B)(ii), is in no manner vague, since it is clear in making it unlawful for one who knows "that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] or attempt[] to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity ... knowing

that the transaction is designed in whole or in part ... to avoid a transaction reporting requirement under State or Federal law." This statute clearly provides sufficient notice to an ordinary person as to the conduct which is criminal and is thus not unconstitutionally vague. United States v. Jackson, 983 F.2d 757, 764 (7th Cir. 1993)(18 U.S.C. § 1956(a)(1)(B) is not ambiguous and is not unconstitutionally vague).

Defendant next contends that in violation of Fed.R.Crim.P. 7(c)(2), the Fifth Amendment's Grand Jury Clause, and the Sixth Amendment right to be informed of the charges, Count 124 fails to provide a sufficient pleading of criminal forfeiture. Fed.R.Crim.P. 7(c)(2) provides that an indictment "shall allege the extent of the interest or property subject to forfeiture." Count 124 clearly provides sufficient notice of the property subject to forfeiture, and Defendant's argument is entirely without merit.

The Defendant next contends that 18 U.S.C. § 982, as applied in Count 124, violates the Excessive Fines Clause of the Eighth Amendment in that Count 124 demands forfeiture of all property involved in the prohibited transactions. The Supreme Court recently held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." United States v. Bajakajian, 118 S.Ct. 2028, 2036 (1998). There is nothing in the indictment, and no

facts have been presented by the Defendant or the Government which might serve as a basis for determining pursuant to Bajakajian that such a forfeiture would be grossly disproportional to the gravity of the offenses with which Defendant is charged. At the time of sentencing, the burden is on the Government to prove by a preponderance of the evidence that the property it seeks in forfeiture was involved in or traceable to the money laundering offense. U.S. v. Voigt, 89 F.3d 1050 (3rd. Cir. 1996).

Finally, pursuant to Fed.R.Crim.P. 7(d), the Defendant moves the Court to strike prejudicial surplusage in paragraph 1 of the indictment (as incorporated into Counts 1 through 73), and paragraphs 3 and 6 of Count 74, on the grounds that these paragraphs include averments regarding certain postal statutes and regulations which Defendant claims are irrelevant and could be confusing and misleading to a jury.

"It is held that a motion to strike surplusage should be granted only if it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial." Wright, Federal Practice and Procedure: Criminal 2d § 127 at 426. Language is properly included in an indictment if it pertains to matters which the government will prove at trial. United States v. Yeaman, 987 F.Supp. 373, 376 (E.D.Pa. 1997); United States v. Caruso, 948 F.Supp. 382, 392 (D.N.J. 1996). These matters need

not be essential elements of the offense if they are in a general sense relevant to the overall scheme charged. Yeaman, 987 F.Supp at 376; Caruso, 948 F.Supp. 392; United States v. Giampa, 904 F.Supp. 235, 271-72 (D.N.J. 1995); United States v. Wecker, 620 F.Supp. 1002, 1006 (D.Del. 1985).

Having reviewed the indictment, the Court finds that the references to the postal statute and regulation prohibiting the mailing of solicitations in the guise of bills, invoices and statements of account are relevant to define the overall scheme to defraud, are relevant to the evidence the government will present at trial, and are not inflammatory and prejudicial.

In conclusion, for the reasons stated above, the Court will deny Defendant Frank P. Bulei's motion to dismiss counts and to strike prejudicial surplusage.

An appropriate Order follows.

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ORDER

AND NOW, this 26th day of August, 1998; Defendant Frank P. Bulei having filed a Motion to Dismiss Counts and to Strike Prejudicial Surplusage; the Government having filed answer objecting to Defendant's motion; for the reasons stated in a Memorandum filed on this date;

IT IS ORDERED: The Defendant Frank P. Bulei's Motion to Dismiss Counts and to Strike Prejudicial Surplusage is **DENIED**.

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RAYMOND J. BRODERICK, J.